

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 29 1994

In the Matter of)
)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Rate Regulation)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
MM Docket No. 92-266

COMMENTS OF RAINBOW PROGRAMMING HOLDINGS, INC.

Rainbow Programming Holdings, Inc. ("Rainbow"), by its attorneys, hereby submits comments in response to the Fifth Notice of Proposed Rulemaking released March 30, 1994 in the above captioned proceeding.^{1/}

Rainbow, a wholly-owned subsidiary of Cablevision Systems Corporation ("Cablevision"), is the managing general partner of several partnerships^{2/} that provide national and regional programming available to more than 120,000,000 subscribers.

^{1/} In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, rel. March 30, 1994 ("Fourth Report and Order" or "Fifth Notice").

^{2/} Subsidiaries of the National Broadcasting Company ("NBC") are general partners in most of the partnerships; subsidiaries of Liberty Media Corporation ("Liberty"), which holds interests in several other programming services, are general partners in several of the regional sports services and Prime SportsChannel Networks. Each of the programming services is organized as a separate partnership with its own general manager and sales, marketing, programming, and production staffs. Rainbow provides legal, accounting, human resources, and other support services for all of the partnerships.

025

Rainbow's programming services include eight regional SportsChannel services, the national backdrop sports services of Prime SportsChannel Networks, and Prism, a premium sports and movie service serving the Philadelphia market.^{3/}

INTRODUCTION

In the Fourth Report and Order, the Commission concluded that the rates for cable service provided to commercial establishments should be governed by the same rules applicable to rates charged to residential cable subscribers.^{4/} The Commission's decision fails to recognize that input costs paid by operators for services such as programming vary substantially according to subscriber type.^{5/} Transactions between operators

^{3/} Other programming services include American Movie Classics, Bravo Network, News 12 Long Island (a regional news service serving Long Island), and MuchMusic. Services soon to be launched include Romance Classics, International Film Classics, and the Singles Network.

^{4/} Fourth Report and Order at ¶ 185.

^{5/} Apart from its mistaken empirical premise, Rainbow has doubts as to whether there is any statutory authority for the Commission's decision. Commercial establishments have ready access to distributors of video programming -- from satellite and microwave licensees -- in addition to cable operators. Bars and restaurants are not the kind of "captive" cable customers that Congress had in mind in enacting the 1992 Cable Act. Rather, the text and the legislative history of the Cable Act manifest Congressional concern over rates paid by "residential subscribers" and "cable households." There appears to have been little, if any, Congressional concern regarding rates paid by commercial establishments. See, e.g., 47 U.S.C. § 522(1) ("the term 'activated channels' means those channels...generally available to residential subscribers..."); 47 U.S.C. § 543(1) (defining "effective competition" by reference to number of "households" accessing and receiving video programming from an alternative multichannel distributor); S. Rep. No. 92, 102d

(continued...)

and programmers vary in terms of price and other conditions, depending upon whether service is provided to commercial establishments. As demonstrated below, there are sound reasons for programmers -- and operators -- to make distinctions between commercial and residential subscribers. If the Commission adopts its proposal on commercial rates, cable programmers will be denied full and fair compensation for the value of the service they provide.

ARGUMENT

Rainbow generally charges cable operators a higher rate for the distribution of sports programming services to commercial establishments. The reasons for doing so are simple. First, the higher rate reflects the market value of these services to these particular subscribers. Rainbow is entitled to be compensated for the additional value that its sports programming creates for commercial establishments. Second, the higher rate compensates Rainbow for revenue it forgoes when its programming services are exhibited in bars and restaurants.

There is little doubt that the exhibition of sporting events on cable program channels provides a major commercial and financial benefit for countless bars and restaurants. Indeed,

^{5/}(...continued)

Cong., 1st Sess. 8 (expressing concern that "only a small percent of the cabled homes" were protected by rate regulation under the Commission's 1991 definition of effective competition); H.R. Rep. No. 628, 102d Cong., 2d Sess. 30 ("House Report") (discussing the number of "households" served by cable and its competitors).

one need only look at the rapid surge in sports bars throughout the country to recognize the significant value that the televised exhibition of sporting events can create for commercial establishments.^{6/} Even in more conventional commercial establishments, however, having a local baseball or basketball game on in the background helps create an atmosphere that attracts and keeps customers. In short, cable programmers such as Rainbow clearly create value for commercial establishments.

It is axiomatic that, under such circumstances, cable sports programmers would seek compensation for the value which they create for commercial establishments. When a bar owner shows his customers a New York Mets game licensed to SportsChannel, he is effectively giving that game away to scores of patrons in order to increase his revenues from the sale of food and beverages. It is contrary to fundamental business and financial principles for a programmer to treat that bar owner the same as a residential subscriber who pays for the right to view that game in the privacy of her home. Yet the Commission's rule would, as a practical matter, force programmers to do just that.

^{6/} See, e.g., Eric Asimov, "Ah, Heaven: A Big Game, A Jug of Beer and Thou," New York Times, January 29, 1993 at C1 (noting that fans are "flocking" to sports bars every night); John M. McGuire, "Sports Bars: They're in the Eye of the Beholder," St. Louis Post-Dispatch, January 10, 1993, at 3F (calling sports bars "a '90's fact of life"); "Serving 'em Sports," Cincinnati Business Courier, December 20, 1993, at Sec. 1, Pg. 1 (quoting the managing editor of Restaurant Hospitality as saying that "sports bars have been growing at an incredible pace, and it has not necessarily peaked").

Indeed, some of the patrons in that bar may forego subscribing to a sports programming service -- or subscribing to cable altogether -- because they can view the games exhibited by that service in a commercial establishment. By charging a higher rate for the programming delivered to such an establishment, the programmer can avoid or minimize this loss of revenue.

The commercial establishment rate also enables programmers to recover a portion of uncompensated advertising revenues. When a game is shown in a bar, hundreds of people may be watching the advertisements shown with that game. Those additional viewers generally are not counted in transactions between advertisers and programmers. Nor do those additional viewers from a single establishment produce a corresponding ratings increase for the programmer. To the extent that the programmer's advertising rates are based upon an artificially low viewership level, charging a differential rate for programming provided to commercial establishments enables the programmer to recover some of the uncompensated value being created for advertisers.

The Commission's proposed rule barring differential treatment of commercial and residential subscribers would seriously disrupt well-established and justified business practices in the cable industry. If the Commission prohibits operators from charging differential rates for commercial establishments, the cable operator will most likely refuse to pay the higher commercial rates charged by some cable programmers. In that event, programmers will be denied revenue to which they

are entitled and which they traditionally have received. Alternatively, if operators decline to pay the higher rate, programmers may refuse to license their service to operators for distribution on a regulated tier of service, limiting the availability of the programming to subscribers willing to pay a separate fee to receive it. Neither of these outcomes is necessary, and neither is desirable for operators, programmers or subscribers.

The Commission's suggestion that operators might be permitted to charge higher commercial rates if they are coupled with lower rates for residential subscribers is of absolutely no benefit to programmers.^{7/} If operators are forced to offset any additional revenue gains from commercial subscribers with lower rates for residential subscribers, they will most likely demand that any programmer charging and receiving a commercial rate a corresponding downward adjustment in its rates for residential subscribers. Alternatively, other programming services may be forced to make downward adjustments to offset the decline in rates from residential subscribers. Thus, the Commission's offset proposal will be just as damaging for programmers as would

^{7/} Fifth Notice at ¶ 257.

a rule that treats commercial subscribers exactly the same as residential subscribers.^{8/}

CONCLUSION

For the foregoing reasons, Rainbow urges the Commission to withdraw its proposal to accord equivalent treatment to commercial and residential subscribers. Cable operators should be permitted to charge commercial subscribers market-based rates for service.

Respectfully submitted,

RAINBOW PROGRAMMING HOLDINGS, INC.

/CSH

Howard J. Symons
Christopher J. Harvie
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Its Attorneys

Of Counsel:

Hank J. Ratner
Executive Vice President -
Legal and Business Affairs
Rainbow Programming Holdings, Inc.
150 Crossways Park West
Woodbury, NY 11797

June 29, 1994

D29253.3

^{8/} Creating a telco-like cross-subsidy scheme for the cable industry is not only of dubious value, it exceeds the Commission's authority under the 1992 Cable Act. See, e.g., House Report at 83 (barring Commission from adopting rules that "replicate Title II regulation"). Even in the telco context, the Commission has sought to minimize cross-subsidization. See Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd. 665, 669 (1991) (segregating business and residential services into separate "baskets" to minimize cross-subsidies); MTS and WATS Market Structure, 2 FCC Rcd. 2953, 2957 (1987) ("cost-based telecommunications pricing is well worth achieving").